

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In the Matter of)
Toll Free Service Access Codes) CC Docket No. 95-155

**JOINT REPLY COMMENTS
NOVEMBER 15, 1995**

Dial 800, L.P. ("Dial 800"), on behalf of itself and on behalf of ten other companies listed on the signature pages of these comments, hereby replies to the comments that were filed in response to the Notice of Proposed Rulemaking in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

Dial 800 is a small marketing and telecommunications consulting company. Our projects include the offering of shared use 800 marketing services in which several different businesses use the same vanity 800 number, each in its own geographic market area. We also provide consulting services in the areas of marketing and telecommunications, and we are developing national marketing programs built around vanity 800 numbers.

The other businesses jointly filing these comments fall into two categories. Some are marketing and/or telecommunications companies similar to Dial 800. Others are simply businesses that depend upon one or a few vanity 800 numbers for their marketing. We believe that, had the deadline for reply comments not been so short, dozens of additional companies would have joined in these reply comments.

We lack the resources to submit comprehensive responses to comments submitted in this matter, and we are not experts in telecommunications law. However, we are concerned that actions being contemplated by the Commission may cause irreparable harm to our business,

to our clients, to our competitors, and to many other businesses similarly situated. We are therefore submitting this response on behalf of ourselves and on behalf of all of the foregoing entities.

We have two primary concerns, one immediate and one long term. First, unless businesses are permitted to replicate their vanity 800 numbers in the 888 exchange, we and many others like us will be severely damaged. Commercial and legal chaos may unnecessarily descend upon numerous businesses. A simple system of replication, based upon reasonable and equitable criteria, is needed. In the interest of fairness, that system must be administered by a neutral party. The carriers and the Resp Orgs are not neutral parties. Whether replication will be needed in subsequent toll-free codes can be decided after 888 is implemented and the results are known.

Second, we are concerned about the overall question of “rights” or “ownership” interests in telephone numbers. Although we believe that the Commission need not address the ownership question at this time, our analysis concludes that there is no reason or justification -- whether based on the needs of law, technology or sound policy -- to deny such rights to users. Recognition would pose no intractable policy problems but would probably promote competition.

II. FAILURE TO GRANT REPLICATION RIGHTS WILL CAUSE IRREPARABLE HARM TO SMALL BUSINESSES.

A. Small Businesses Cannot Rely Upon Carriers Or Resp Orgs For Reasonable Protection Of Commercial Needs.

Small businesses have relatively little leverage with carriers. They also rarely have sufficient resources for protracted legal battles based on claims of unfair competition or trademark infringement. Unless small businesses are given the opportunity -- based upon reasonable and equitable criteria -- to replicate their vanity 800 numbers, many will find that

their larger, stronger competitors have obtained the 888 equivalent of such numbers. In our intensely competitive marketplace, such a result may destroy some small businesses.

Carriers have little incentive to assist such small businesses. Like other rational business organizations, carriers make intelligent, self-interested decisions. If two of a carrier's customers request the same 888 number, and if one customer has low volume while the other customer has high volume, the rational decision by the carrier will generally be to give the number to the high volume customer. Sales people and managers are under pressure to generate sales -- a situation not always consistent with doing what is fair and equitable. Expecting them to apply a policy requiring assignment on a first-come-first-served basis may be unrealistic. In other words, carriers lack incentive to assist small businesses in such situations -- but they may have incentive to discriminate, possibly in violation of the Communications Act. Though a few major carriers may claim the ability to police such conduct, the vast majority of carriers could not do so. Small businesses would inevitably be harmed by discriminatory practices.

Resp Orgs, to the extent that they are separate from carriers, would face similar incentives. Small businesses would similarly be victimized.

B. Trademark Law Does Not Offer Adequate Protection.

Trademark law does not offer adequate protection. Shortly after the initiation of 800 number portability, the U. S. Patent and Trademark Office instituted policies making it more difficult to obtain trademark protection for vanity 800 numbers. Many small businesses today rely upon vanity 800 numbers but lack federal trademark protection. This is true despite those business's legitimate and recognized interests in their respective marks. Moreover, many businesses with registered marks lack the resources to defend those marks against the onslaught of a wealthy and determined competitor. Thus, the Commission should not

assume that legitimate interests not protected by the Commission will be protected under trademark law.

C. **A Reasonable, Equitable, Short Term Replication System Would Prevent Irreparable Harm.**

A fair and equitable replication system would enable customers to request replication of their 800 numbers during an interim period of 60 to 90 days. Paging customers would not have the replication option. A small fee would be charged in order to cover administrative costs. The system would apply uniformly to all Resp Orgs. If Resp Orgs/carriers notified customers of the replication option as part of their January or February, 1996, billing, the introduction of 888 would not be delayed. The notice to customers could be added to bill printing formats at little cost. The entire replication system could expire within a few months.

To the extent that some interested parties may object to the costs of such a replication system, we respond as follows. First, the question is not whether or not there will be costs: 888 has the potential for so much confusion and so many problems that there will inevitably be substantial costs. The only question is how great those costs will be. The cost of replication will be far less -- to businesses, to consumers and to society as a whole -- than the costs that will result, absent replication, in the form of business dislocations, lost jobs and litigation. Second, to the extent that there is an actual cost, it can be recovered in the form of replication fees.

It will be unfortunate if, in numerous future judicial opinions, judges state that much complex and costly business litigation could have been avoided if only the FCC had mandated a simple, low cost replication system.

It is clear that the creation of the 888 toll-free code has the potential to upset the existing commercial balance among competitors. Rather than simply solving a technological problem, 888 has the potential to be a disaster for numerous small business

organizations. It is therefore imperative that the Commission take reasonable steps to ensure that 888 numbers are allocated in a manner that does not prejudice existing interests. Neither the carriers nor the Resp Orgs can be relied upon in this regard. A simple, inexpensive, short-term regulatory solution would solve the problem.

III. ALTHOUGH THE COMMISSION NEED NOT REACH THE QUESTION OF "OWNERSHIP" OF NUMBERS, ESTABLISHING SUCH RIGHTS WOULD POSE NO INTRACTABLE POLICY PROBLEMS AND WOULD PROBABLY PROMOTE COMPETITION.

We believe that the Commission need not reach the question of whether customers should be granted rights or interests in their telephone numbers. However, we believe the establishment of such rights would cause no significant problems -- whether in terms of law, technology or policy. In fact, for the following reasons, we believe that the establishment of such rights -- judicially, if not administratively -- is virtually inevitable from a policy point of view.

A. The Principal Policy Justification For Denying Some Form Of "Ownership" Rights Is No Longer Applicable.

We have been advised by counsel that the administrative and judicial policies denying "ownership" rights in telephone numbers arose based upon technological necessity. That is, as the telephone system developed, area codes and exchanges sometimes had to be changed. This was not a matter of preference or bias on the part of regulators or local telephone companies. Rather, it was geographically and technologically necessary: population growth mandated the construction of additional Central Offices and similar facilities. There was no choice but to divide area codes, rearrange exchanges, etc. Because area codes and exchanges were geographically determined, customer phone numbers sometimes changed. There was no alternative. When customers complained to local regulatory authorities or filed law suits, their claims inevitably had to be denied. The march of progress could not stop because a few

individuals or businesses wanted to keep their telephone numbers. Thus, technological and geographical reality mandated policies and judicial decisions denying ownership rights. It made total sense.

But today, it makes no sense at all. Number portability eliminates the technological justification for the “no ownership” policy. Unlike local telephone numbers, 800 numbers are not geographically limited. They are non-geographic by definition. (Before portability, 800 numbers were technologically tied to specific carriers, although not for the reasons that apply to local telephone numbers. But they were technologically tied nonetheless.) Since the advent of 800 number portability, customers have been free to change carrier and/or Resp Org at will. When portability began, the technological justifications for denying some form of “ownership” of 800 numbers disappeared.

B. In The Wake Of Portability, Sound Policy Will Require Some Form Of “Ownership” Rights.

800 number portability is a fulcrum of change, a watershed in terms of both technology and policy. Meaningful competition among local telephone companies will require local number portability. Such a development would not uncouple local telephone numbers from their geographic boundaries, but it would certainly unshackle them from local monopoly control. Who better than the customer to control the phone number -- and with it the decision of which local telco to use?

Moreover, to the extent that PCS is based upon totally non-geographic numbers, and to the extent that competition is desirable in the PCS marketplace, number portability will be necessary. What possible justification can exist for denying customers the right to control their telephone numbers in a manner very much resembling “ownership?” A significant measure of customer control seems inevitable.

We are not aware of any justification -- whether based on the imperatives of law, technology or policy -- to deny customers some form of "ownership" rights. The principal response to the foregoing arguments seems to be that telephone numbers are a scarce, valuable "public resource." "Public resource" is a noble term, but what does it mean? Many things can be referred to as public resources, such as land, taxi medallions, liquor licenses, and radio spectrum. Yet all can be owned, leased or licensed, and then used, developed and exchanged, subject to reasonable and appropriate regulations. We think telephone numbers are not significantly different.

(One way in which telephone numbers do differ from land, taxi medallions, liquor licenses, and radio spectrum is that telephone numbers are not "scarce." They are finite, but they are not scarce. The recent creation of new area codes makes possible literally billions of new telephone numbers. To the extent that toll-free numbers may currently be in short supply, the scarcity is a short term matter: opening new toll-free area codes will eliminate that scarcity.)

We have sought to understand why so many long distance carriers, local telcos and related organizations persistently insist that telephone numbers are a public resource in which individuals and organizations must not be allowed to obtain any form of rights or interests. To the extent that they contend that the marketplace will cause abuses, we reply that simple, inexpensive regulatory solutions are available. Moreover, even if the regulatory scheme were unable to stop all abuses, the cost of failure would be trivial. We are not dealing with nuclear power plant safety or air piracy; in most cases, the stakes are very low when it comes to telephone numbers. Notwithstanding the protestations of some parties, unregulated abuses have little or no social or economic impact. From a pure cost-benefit point of view, an outcome involving replicability, customer ownership and a simple regulatory scheme to prevent abuses

seems far superior to the inevitable and inequitable economic dislocations and anti-competitive effects which would result absent such an outcome.

C. The Transfer Of Telephone Numbers Is An Ordinary And Necessary Part Of The Sale Of A Business.

To the extent that some parties contend that there must be an absolute prohibition on transfer of numbers, the Commission should note that transfer of both 800 numbers and local numbers is a daily occurrence. Every time a sole proprietor sells his or her business, and every time a business corporation sells its assets, one or more telephone numbers (800 or local or both) are transferred to the new owner of the business -- along with the lease, the customer lists, the inventory, the trademarks and numerous other items. Denial of such transfers of either or both 800 or local telephone numbers would be disastrous for American business.

Why, then, do so many commenting parties object to the possibility of private rights in telephone numbers? We surmise their positions stem from self-interested, anti-competitive impulses. So long as customers do not control their phone numbers, individual carriers (local and long distance) will do so and will be able to manipulate this valuable "public resource" for their own benefit. Although we do not ask the Commission to establish such rights in this proceeding, we do ask that the Commission take no action which would prejudice the consideration of such rights in the future.

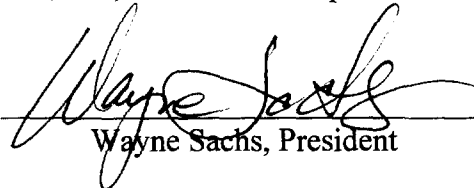
IV. CONCLUSION.

For all of the reasons set forth above, the Commission should take steps to ensure that the allocation of 888 numbers does not damage existing businesses. A simple, equitable, short term system of replication would prevent such a problem from arising.

Although opponents of replication may fear that such a system might give rise to problematic rights or interests in telephone numbers, the Commission need not fear the evolution of such rights because no significant costs or policy problems would result.

Respectfully submitted,

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